IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-131.

DELAWARE STATE BOARD OF EDUCATION, et al.,
Petitioners,

v.

BRENDA EVANS, et al.,
Respondents.

REPLY BRIEF IN SUPPORT OF THE STATE BOARD'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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This brief is filed under Rule 24, paragraph 4, in response to the "Brief in Opposition to Certiorari" filed by the plaintiffs in *Delaware State Board of Education, et al., v. Brenda Evans, et al.*, No. 77-131.

In its petition, the Delaware State Board of Education (the "State Board") made two basic points. First, the decision of the court below was in direct conflict with the decisions of this Court and the decisions of other Courts of Appeal both on the question as to what constitutes an interdistrict constitutional violation and what constitutes an appropriate remedy for any such constitutional violation. The second point was that the decision of the court below erroneously held that the summary order of affirmance by this Court of an interlocutory judgment foreclosed all issues that this Court could have addressed and not merely those that it necessarily did address. The plaintiffs in their brief have not addressed either of these points.

A. Plaintiffs' Liability Argument Is Premised on the Erroneous Premise That There Was a Continuing Interdistrict Violation in New Castle County From the Time of Brown-I.

The plaintiffs' entire position as to constitutional liability is premised on an assertion that there was a continuing interdistrict violation in New Castle County from before *Brown-I* in 1954 and continuing to the present (Brief in Opp. 5, 7, 10, 11, 13, 14, etc.).

The opinion of the majority of the three-Judge Court (hereafter "the majority") did not mention an explicit continuing interdistrict violation in New Castle County.[1] The

1. The dissenting opinion in the Circuit Court catalogued the eight (8) alleged violations mentioned or referred to in the opinion of the majority of the District Court (555 F. 2d at 384): no mention is made of a specific continuing interdistrict violation. The majority opinion refers to and accepts the dissenters' catalogue of alleged violations and does not even suggest that in addition to the eight alleged violations there was an explicit continuing interdistrict violation.

majority actually found that Delaware's pre-*Brown* interdistrict transfer of some white and black students into Wilmington ceased soon after the *Brown-I* decision. So far as blacks are concerned, the majority said (393 F. Supp. at 433):

> "Some time after Brown-I this interdistrict transfer program ceased and black children attended school in suburban districts where they resided." [2]

The majority also found that since the 1950's Wilmington and suburban schools have operated independently (393 F. Supp. at 437):

> "Since the 1950's, however, Wilmington and suburban schools have, to a great extent, operated independently of one another. The suburban districts have for the past several years operated unitary schools for the children residing within their districts."

(In footnote 19, the majority stated:

> "There is no evidence in the record which indicates that suburban schools in New Castle County are presently operating other than unitary schools for the children residing in their districts. . . .")

Thus, the majority of the three-judge court found that, while there had been some interdistrict transfers of both white and blacks into Wilmington in the pre-*Brown-I* period, the Court found that these transfers ceased at about the time of *Brown-I* or shortly thereafter. It also found that the suburban districts were unitary school districts.

The majority, having made the above findings, went on nevertheless to hold that these findings constituted an

2. The inter-district violation found by the trial court consisted of transportation of 191 black suburban children to Wilmington schools in the 1954-55 school year, not since. 393 F. Supp. at 433.

adequate basis for it to consider interdistrict remedial relief. (There was, of course, an articulate dissent by Senior Judge Layton whose analysis of the evidence confirms the absence of any basis for finding a continuing interdistrict violation (393 F. Supp. at 447 to 453).

The plaintiffs' assertion that there was a continuing interdistrict violation following *Brown* is certainly belied by the contemporary judicial observations. In 1955, this Court, in *Brown-II*, recognized that there had been prompt, affirmative and successful efforts to desegregate in Delaware (349 U. S. at 299). The prompt compliance in New Castle County was acknowledged by the Third Circuit in *Evans v. Buchanan*, 256 F. 2d 688, 690 (3rd Cir. 1958), and in *Evans v. Ennis*, 281 F. 2d 385 (3rd Cir. 1960), where the court stated:

> "In short, integration in the State of Delaware, which has already integrated many of its schools, particularly in the Wilmington metropolitan area, should not be viewed, gauged or judged by the more restrictive standards reasonably applicable to communities which have not advanced as far upon the road toward full integration as Delaware." 281 F. 2d at 393.

The district court itself, in *Evans v. Buchanan*, 195 F. Supp. 321 (D. Del. 1961), approved a two-step plan for the integration of public schools in all of Delaware. The first step provided for the immediate admission on a racially nondiscriminatory basis of all Negro children desiring to attend the formerly white schools. The second stage provided for the full integration of school facilities throughout the State and was to be accomplished by a new school code which eliminated the small and overlapping dual school districts and established thirty unitary districts. Significantly, the plan, approved by this Court in 1961, retained the Wilmington School District, the largest, wealth-

iest and most educationally advanced in the State, as geographically coterminous with the boundaries of the City of Wilmington, as it had been for more than one hundred years, and comprehended a scheme of school district organization not unlike that which presently exists in northern New Castle County. The District Court could not have approved such an organizational proposal if, in fact, there existed at the time the substantial interdistrict segregation now claimed by plaintiffs to have existed all along.

The majority began by saying that formerly white schools in Wilmington became black schools after *Brown-I* (393 F. Supp. at 434):

> "Nearly all of the Wilmington schools which were segregated white schools before Brown-*I* have *since* become predominantly black schools." (Emphasis added.)

The majority acknowledged that this situation was due to demographic changes that had occurred in New Castle County (as elsewhere) but maintained that these demographic changes were not "exclusively from individual residential choice and economics but also from assistance, encouragement and authorization by governmental policies." (393 F. Supp. at 434).

What these constitutional violations in fact were was adumbrated rather than spelled out in the remainder of the trial court's opinion.

Except for the Educational Advancement Act, school transportation for private and parochial schooling and the use of optional zones by the plaintiff Wilmington School District in the 1950's, none of the alleged "violations" related to education or schooling and none were in any way the acts or policies of the State Board or any school district.

(a) The majority first referred to the 1936 housing policy of an agency of the United States Government, saying (393 F. Supp. at 434):

> "Here as elsewhere the 1936 Federal Housing Administration Mortgage Underwriting Manual, which continued in use until 1949, advocated racially and economically homogeneous neighborhoods."

(b) Second, the majority stated that prior to the passage of federal and state fair housing legislation, racial discrimination

> "in private housing in New Castle County, was widespread, was tolerated or encouraged by the real estate industry and was sanctioned by state officials". (393 F. Supp. at 434)

(c) Third, the majority said (393 F. Supp. at 434):

> "Racially restrictive covenants held to violate the 14th Amendment in Shelly v. Kramer, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948), continued to be recorded in New Castle County real estate deeds until 1973."

As to this item, Judge Layton in dissent said (393 F. Supp. at 448):

> "The majority concedes that twenty-seven years ago the Supreme Court declared racial covenants contained in deeds to be of no effect. The majority cites no authority requiring the Recorder of Deeds to cull out and delete this sort of material from the numerous deeds filed daily for recording; nor does it attribute any special legal significance to failure to cull out such language."

(d) Next the majority referred to a real estate "primer" containing the Code of Ethics of the National Association of Real Estate Boards in which one section suggested that a realtor should not introduce individuals of the race or nationality "whose presence would clearly be detrimental to property values in that neighborhood". The majority said this particular sentence was not eliminated in the "state publication" until 1970 (393 F. Supp. at 435).

(e) The majority then stated that a study of a "multi list" in the period 1965 to 1967 "indicated that 50% of the new listings in the City of Wilmington were open but only 7% of the new listings in the suburbs were open. PX-179" (393 F. Supp. at 434).

(f) This miscellaneous list concluded with a finding that neither the Wilmington Housing Authority nor the New Castle County Housing Authority (created in 1972) had built any substantial number of housing units other than in the City of Wilmington. The majority said (393 F. Supp. at 435):

> "Undoubtedly there are many legitimate objections to public housing developments, but the fact remains that during a period of extraordinary population growth in New Castle County, virtually the only public housing units constructed were located in the City of Wilmington."

There are three comments applicable to all six of the above items. First, none of the six could be ascribed to the State Board or to a school district; none involve educational law or policy. Neither the school districts nor the State Board could have influenced or controlled any of them, much less prevented or terminated any of these laws,

policies or practices. Second, there is not the faintest suggestion that any of the six was motivated by an intent to promote segregation in Delaware schools. Clearly, the majority was simply listing various factors which it thought might have had an effect on the disparate racial composition of the suburbs and Wilmington. Third, there was no attempt by the majority to measure the effect, if any, of these alleged violations. Indeed, this list of six disparate factors that might have had an effect on the racial balance in the schools does not delineate a continuing interdistrict violation at all. It is nothing more than a pre-*Dayton* (*Dayton Board of Education v. Brinkman*, — U. S. —, 97 S. Ct. 2766 (1977)) attempt to create a base for an interdistrict remedy on a cumulative violation theory.

The majority then, for the first time, referred to an alleged violation that involved educational policy. The policy in question was that of the Wilmington School Board, the principal plaintiff in this case, which had, to use the language of the majority's opinion, "in several instances" permitted the use of optional school zones (393 F. Supp. at 435). The majority's footnote 14 refers only to the years 1958 and 1959. The record is clear that Delaware school districts have plenary authority to draw attendance zone boundaries and, thus, neither the State Board nor, of course, the suburban districts knew or participated in the alleged violations by the plaintiff. The majority said (393 F. Supp. at 438):

> "Moreover certain policies of the Wilmington School Board, although possibly designed to minimize the flight of white families with school age children into the suburbs may have had the opposite effect."

The majority (to the extent it made a finding on intent) found that the intent was to minimize white flight. The

majority then went on to say that the effect may have been to affect the relative racial balance (393 F. Supp. at 436):

> "To some extent then, discriminatory school policies (*i.e.*, the use of optional zones) in Wilmington may have affected the relative racial balance in housing and schools in Wilmington and the suburbs."

The majority of the three-Judge Court then touched on the State's school transportation policy providing transportation for private and parochial school children. The Court said:

> "Since approximately 94% of all private and parochial students are white, the effect of the interdistrict subsidy in New Castle County, where 16,535 students attend these schools at the time of the trial is frequently to assist white children residing in Wilmington to attend non-public schools in the suburbs and vice versa. To the extent that the subsidy has had an effect on public school enrollment, it has undoubtedly served to augment the racial disparity between Wilmington and suburban public school populations."

There is no finding that there was a discriminatory purpose or intent in either the State's transportation legislation or policy in connection with private and parochial students. At most, the majority seems to surmise the effect is to augment the racial disparity between Wilmington and the suburban public school populations. In addition, there was no measurement of the effect of this transportation policy. Significantly, the three-Judge Court declined to hold the transportation legislation unconstitutional.

Clearly an interdistrict violation cannot be based on the Educational Advancement Act since there was a specific statement that the majority did not find the Educational Advancement Act to be racially motivated (393 F. Supp. at 428):

> "We cannot conclude, as plaintiffs contend, that the provisions excluding the Wilmington District from school reorganization was purposefully racially discriminatory. * * * In short, the record does not demonstrate that the intent and purpose of the Educational Advancement Act was to foster or perpetuate discrimination in school reorganization. Effective, as well as intentional racial classification, however, requires special scrutiny under the Equal Protection Clause."

If the foregoing did not make it clear that there simply was no evidence that suggested invidious motivation, the majority re-emphasized what it had already said later in the opinion (393 F. Supp. at 439).

> "In short, the record does not demonstrate that a significant purpose of the Educational Advancement Act was to foster or perpetuate discrimination through school reorganization." [3]

The majority, though it could not find that the Educational Advancement Act was racially motivated, indicated it came within a "suspect classification" and thus was not "entitled to the ordinary presumption of constitutional

3. The majority of the three-Judge Court reaffirmed in its subsequent remedy opinion that it had made no finding that the Educational Advancement Act was unconstitutional, saying (416 F. Supp. at 340):

> "We did not in our last opinion hold that the Educational Advancement Act was drawn with an actual segregatory intent."

validity" (393 F. Supp. at 440), citing *Hunter v. Erickson*, 393 U. S. 385 (1969); *Loving v. Virginia*, 388 U. S. 1 (1966); and *Lee v. Nyquist*, 318 F. Supp. 710 (W. D. N. Y. 1970), *affm'd.* 402 U. S. 935 (1971). These three cases all involved explicitly racial laws. Since the Educational Advancement Act was not explicitly racial, the three-Judge Court tried to rely on cases it deemed to hold that suspect classifications exist "even where there is no explicit policy embodying a racial classification". (*Hawkins v. Town of Shaw, Mississippi*, 461 F. 2d 1171 (5th Cir. 1972); *Kennedy Park Homes Assoc., Inc. v. City of Lackawana, New York*, 436 F. 2d 108 (2d Cir. 1970), *cert. denied*, 401 U. S. 1010 (1971); *Norwalk Core v. Norwalk Redevelopment Agency*, 395 F. 2d 920 (2d Cir. 1968), and 393 F. Supp. 428 at 441.)

This Court, in *Washington v. Davis*, 426 U. S. 229 (1976), considered the cases referred to by the majority and rejected them, holding that even where there was a substantially disproportionate racial impact by a statute without discriminatory purpose, the statute was not unconstitutional.

Thus, the racial impact theory relied on by the majority was discredited by *Washington v. Davis*. As succinctly stated by Judge Tone in *United States v. Board of Commissioners of City of Indianapolis*, 541 F. 2d 1211 (7th Cir. 1976):

> "The majority relied on the racial impact theory as found by the District Court in Evans. The summary affirmance of the three-Judge District Court's judgment does not necessarily find approval of that Court's reasoning, and that reasoning clearly cannot stand after Washington v. Davis."

This Court vacated the judgment of the majority of the Seventh Circuit in *Indianapolis* and remanded the case

to the Court of Appeals for further consideration in the light of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252 (1977) and *Washington v. Davis*. Clearly, this case merits no less consideration than did the *Indianapolis* case.

In *Mount Healthy City School District v. Doyle*, — U. S. —, 97 S. Ct. 568 (1977), this Court ruled that the existence of an alleged constitutional violation in itself is not a sufficient predicate for federal judicial relief, in the absence of a direct causal relationship between that violation and the condition complained.

Under *Mount Healthy*, therefore, remedial action in this case can not be justified in the absence of a resolution of the question whether, in the absence of preclusion in the Educational Advancement Act concerning Wilmington, the State Board would have consolidated the Wilmington School District with one or more contiguous districts. In fact, the majority found, contrary to the essential premise of the plaintiffs' interdistrict arguments, that the State Board was not "required to consolidate the Wilmington District", 393 F. Supp. 445, and further noted that "the record does not suggest that, but for the statutory exclusion from its reorganization authority, the State Board would necessarily have consolidated Wilmington with any other district." 393 F. Supp. at 442. Thus, in this case, there is no finding of causal effect as required by *Mount Healthy*.

B. The Remedy Imposed by the District Court and Affirmed by the Circuit Court Is Invalid Under Judgments and Opinions of This Court.

The plaintiffs' brief gingerly recites in elaborate detail the procedural steps and the recitations from this Court's opinions that led the three-judge court and the court of

appeals to the present order on remedy. Nowhere do the plaintiffs have the courage to state that the end result is the collapse and disappearance of ten unitary suburban school districts, as well as the Wilmington School District, and the creation of one super district that would become responsible by a stroke of the federal judicial pen for the education of more than sixty percent (60%) of the pupils of the State of Delaware. The court of appeals, after eliminating patently illegal racial quotas, by a four to three decision, and contrary to its own position that relief must be directed and limited to cure of the constitutional violation, upheld this drastic plan of remedy. By no stretch of the judicial imagination could it be said that such a monster district would have been the result but for the alleged violations. The creation by judicial fiat of one super district for 60% of the pupils of the State of Delaware, and the destruction of eleven historic school districts that had previously existed is surely without precedent in this record. There was no attempt whatsoever to measure the extent and effect of the alleged violations in a genuine effort to create a remedy, the sole purpose and effect of which would be to put those whose rights had allegedly been violated back in the position they would have been in but for the violations.

This Court should, consistent with its decisions in *Washington v. Davis*, 426 U. S. 229 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252 (1977); *Austin Independent School District v. United States*, – U. S. –, 97 S. Ct. 517 (1976); *United States v. Board of School Commissioners of Indianapolis*, – U. S. –, 97 S. Ct. 800 (1977); *Dayton Board of Education v. Brinkman*, – U. S. –, 97 S. Ct. 2766 (1977); *Brennan v. Armstrong*, – U. S. –, 97 S. Ct. 2907 (1977); and *School District of Omaha v. United States*, – U. S. –, 97 S. Ct. 2905 (1977), grant the writ of certiorari and reverse the judgment below.

Respectfully submitted,

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